Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning	)	
the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the	)	
Communications Act of 1934, as amended	)	

CONSOLIDATED OPPOSITION AND REPLY COMMENTS OF THE STATE OF HAWAII

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The State of Hawaii (the "State"), by its attorneys, hereby opposes the petitions for reconsideration filed by several interexchange carriers on September 16, 1996 in the above-captioned proceeding.[1] The State also replies to the Request for Extension of Compliance Deadline filed by AMSC Subsidiary Corporation on August 23, 1996.[2] As discussed more fully below, none of these petitioners has presented grounds for the Commission to retreat from its largely successful implementation of Section 254(g) of the Communications Act. Indeed, the carriers' persistence in seeking forbearance or other exemptions from that provision further

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[1] This opposition is submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs. Unless specified otherwise, references made herein to petitions for reconsideration are to those filed in this proceeding on September 16, 1996, and references to comments and reply comments are to those filed in this proceeding on April 19 and May 3, 1996, respectively.

[2] Policy and Rules Concerning the Interstate, Interexchange Marketplace/ Implementation of Section 254(g) of the Communications Act of 1934, as amended, Order and Order Seeking Comment, CC Docket No. 96-61, DA 96-1538 (released Sep. 13, 1996). The State filed initial comments in response to AMSC's request on October 4, 1996, indicating among other things that it would separately respond to AMSC's request for more than a year's extension to come into compliance. To avoid the filing of redundant pleadings, the State addresses this aspect of AMSC's request in Section IV. below.

demonstrates the need for the Commission to ensure that its implementing regulations are effectively enforced.

I. Introduction and Summary

In its August 7, 1996 Report and Order ("Order"), the Commission properly applied Section 254(g)'s geographic rate averaging and rate integration requirements to all carriers regardless of their size and regardless of regional variations in competition so that, as Congress intended, all Americans can receive telecommunications services at reasonable rates and secure the benefits of increased competition among telecommunications carriers.[3] The State has sought clarification and reconsideration of the Order to assure that the clear mandate of Section 254(g) is properly applied and, in particular, to assure that carriers do not misread the Order as an invitation to avoid the statutory principles of geographic averaging and rate integration. The carriers, in contrast, have sought reconsideration of the Commission's Order, in essence asking the Commission to water down or other otherwise undo important aspects of the Commission's implementation of the statutory mandate.

AT&T reiterates its amorphous request (from its initial comments) that the Commission forbear from the geographic averaging requirement in instances where nationwide carriers face regional competition.[4] GTE and U S West seek reconsideration of the Commission's decision to require rate integration across affiliates.[5] IT&E and AMSC argue that

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[3] Id., Report and Order, FCC 96-331 (released Aug. 7, 1996).

[4] AT&T Corp.'s Petition for Reconsideration at 1 ("AT&T Petition").

[5] Petition for Reconsideration and Clarification of GTE Service Corporation at 2-8 ("GTE Petition"); U S West, Inc.'s Petition for Clarification, or, in the Alternative, Reconsideration, passim ("U S West Petition").

carriers with high-cost regional services, such as themselves, should not be required to integrate their rates but should be permitted to assess geographically discriminatory surcharges in high-cost areas to recoup the added costs of serving those areas.[6]

In its Order, the Commission has already properly addressed these issues. None of the carriers presents significant new material or a sufficient rationale for reconsidering them. AT&T purports to offer new evidence of the need for forbearance. At bottom, AT&T simply repeats its earlier efforts to undermine the very purpose of geographic rate averaging -- amelioration of the impact that regionally disparate costs would otherwise impose on subscribers in different parts of the country. As to the concerns of GTE and U S West, the Commission is correct in requiring rate integration across affiliates because, if it did not do so, carriers would surely feel free to evade the requirement through legally separate affiliates. GTE and U S West complain, in part, that rate integration across separate affiliates is improper because their affiliates sell different services. On this point, the Commission can clarify that rate integration only requires that affiliates employ the same rate structure for comparable services. IT&E and AMSC essentially repeat their prior claims that integrating rates would make them less competitive. However, neither carrier demonstrates how its requested relief can be reconciled with Congress's mandate that the Commission prohibit unreasonably discriminatory rate structures.

Thus, on reconsideration, the Commission should reject these pleas and remain faithful to the two important goals of the Telecommunications Act of 1996 -- fostering

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[6] Petition for Partial Reconsideration of IT&E Overseas, Inc. at 5-9 ("IT&E Petition"); Petition for Reconsideration of AMSC Subsidiary Corporation, passim ("AMSC Petition").

competition while simultaneously assuring that increased competition safeguards all subscribers' access to telecommunications services on reasonable terms.

II. The Commission Already Has Addressed AT&T's Claims and Has Appropriately Rejected Them

AT&T claims that "recently-available facts . . . now confirm that national carriers need greater flexibility to file geographically specific rates and optional calling plans" in order to respond to regional competition.[7] Specifically, the carrier cites Southern New England Telephone's recent campaign in Connecticut to offer bundled services under its "home town" brand, and SNET's opposition to AT&T's responsive offering of region-specific discounts. AT&T also cites Alltel's bundling campaign in Georgia, and it complains that these regional competitors have an additional competitive advantage in that, unlike national carriers, they do not have to average the range of access charges that underlie national carriers' rates.[8]

Despite its characterization of these "developments," AT&T offers no new reason that would justify forbearance. In initial comments, several carriers including AT&T argued at great length about how geographic averaging could impair their ability to compete against allegedly "low-cost" regional carriers or even force carriers to abandon high-cost areas in order to compete in low-cost regions.[9] In reply comments, the State noted that these arguments really boil down to claims that geographic averaging is inappropriate policy in light of the forthcoming infusion of competitive forces into the interexchange market, and that such allegations

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[7] AT&T Petition at 2.

[8] Id. at 2-6.

[9] AT&T Comments at 29-31; Comments of Sprint Corporation at 10-13; Comments of Telecommunications Resellers Association at 29-32.

nonetheless fly in the face of Congress's explicit, contrary finding that geographic averaging must be preserved in this new environment.[10]

In its Order, the Commission essentially reconfirmed this finding. The Commission correctly concluded that forbearance from Section 254(g) to allow regional deaveraging would create "a substantial risk that many subscribers in rural and high cost areas [would] be charged more than subscribers in other areas . . . [and] that widespread deaveraged rates for interexchange services could produce unreasonably high rates for some subscribers."[11] Nothing in AT&T's petition dispels these critical concerns.

It also bears reemphasizing that, in enacting Section 254(g), Congress was not ignorant of the status, or likely future, of competition in the interexchange market. Congress was not ignorant of the regional disparities in underlying interexchange access costs. That some carriers currently offer more services than others is no surprise and was obvious when the statutory regime was crafted. Congress's elimination of barriers to entry allows all carriers to offer all services, but no one could reasonably believe that all carriers would offer the same bundles of services immediately after passage of the Telecommunications Act. It also is no surprise that local carriers have marketing angles that national carriers do not. Given this context, Congress clearly rejected claims such as those AT&T has raised. Congress codified geographic rate averaging in order to promote its overriding universal service goals, and it did so at the same time that it took landmark steps to facilitate regional competition in the interexchange market. AT&T's argument against geographic averaging in an era of increasing

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[10] Reply Comments of the State of Hawaii at 12.

[11] Order at ¶ 39.

regional competition may have been appropriately raised when Congress was considering Section 254(g), but it is not appropriate now after Congress has repudiated it.

Moreover, AT&T's complaints about access charge levels and others' bundling activities are, as a practical matter, irrelevant. AT&T is not prohibited from bundling services. The Commission is committed to reforming the nation's access charge regime as quickly as possible, and AT&T previously indicated that geographic averaging will only be burdensome until access charge structures are reformed.[12] In addition, as regional carriers expand to offer nationwide and international services, they will face whatever regional issues AT&T does. One can realistically expect the major regional players to rapidly become providers of nationwide and global service, albeit sometimes using the facilities of others. Thus, even these new entrants will have national (and international) cost components underlying their offerings through the acquisition of services from other interexchange carriers, and there will be plenty of averaging of costs by all carriers. Ultimately, the factual predicate for AT&T's petition has no bearing on the long-term future of the interexchange market.

In an effort to minimize the breadth of its request, AT&T alleges that regional competition is somehow a unique occurrence -- requiring unique responses from national carriers -- and that relieving carriers of their rate averaging obligations in these circumstances will not hurt consumers since consumers that lack the benefits of regional competition will still enjoy

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[12] AT&T Comments at 34 ("The Act thus contemplates and requires that the access charge mechanism be completely overhauled, so that subsidies are removed and prices are driven to efficient, forward-looking cost-based levels. After this occurs, of course, access prices will be far lower and more uniform than they are today, and a reasonable averaging policy should impose fewer burdens and anomalies").

"general rate-averaged rates."[13] The suggestion is ludicrous. Had Congress intended, as AT&T implies, that subscribers in less competitive regions should enjoy a "rate freeze" while only those in competitive regions reap the benefits thereof, Congress would not have required rate averaging. The regionally discriminatory pricing strategies for which AT&T seeks special relief are the antithesis of averaging. In the Order, the Commission recognized that an exception based on regional competition would create an enormous loophole.[14] Such a loophole would defeat Congress's intent that increased competition in interexchange services, whether on a regional or national level, not result in discrimination against regions where competition is less intense.

AT&T also argues that, to be competitive, it should be allowed to offer "temporary promotions" for periods up to two years.[15] Any such relief would make a mockery of the Commission's efforts to ensure that temporary promotions do not result in unreasonable geographic discrimination.[16]

III. The Commission Appropriately Prohibited Carriers from Using Separate Affiliates to Obviate the Rate Integration Requirement

GTE and U S West seek reconsideration of the Commission's decision to require rate integration across affiliates. They essentially argue that an individual operating affiliate should only integrate its own rates and should not have to consider the rate structures of its sister

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[13] AT&T Petition at 7.

[14] Order at ¶ 39.

[15] AT&T Petition at 9-11.

[16] Order at ¶ 29 (promotions should not be the basis for repeated offerings by carriers).

operating companies. Despite their discomfort with the Commission's decision, the Commission was correct in requiring integration across affiliates.

If there was one issue on which the overwhelming majority of commenters agreed, it was that enforcing Section 254(g) must be a paramount concern. Like the State, numerous parties pointed out that, without clear enforcement mechanisms, there will be no realistic method of ascertaining on a continuing basis whether a carrier is in compliance with the statute and the Commission's rules.[17] The need for enforcement mechanisms has been made all the more clear by carriers' persistent efforts to eviscerate Section 254(g). Given this record, the Commission's Order appropriately recognizes that carriers also could attempt to evade Section 254(g) and its implementing regulations if they were not required to integrate their rates across affiliates.

It also should be noted that both GTE and U S West overstate the ramifications of the Commission's decision. GTE suggests that requiring integration across affiliates would create unreasonable results, such as CMRS services cross-subsidizing interexchange services.[18] U S West states that its affiliates "operate independently, and sell different products under different brands to different sets of customers" and that investors in the different affiliates will have their expectations defeated if Section 254(g) applies to the affiliates collectively.[19]

The State respectfully submits that the companies, on this point, have read too much into the Order. The State has always understood the rate integration concept to apply to

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[17] E.g., Comments of Rural Telephone Coalition at 4-5; Comments of America's Carriers Telecommunications Association at 9-10; Comments of General Communications, Inc. at 8.

[18] GTE Petition at 9, n. 15.

[19] U S West Petition at 3.

individual services. For example, carriers must offer uniform rate structures for residential toll service, but need not necessarily use those same structures in offering 800 and other business services. The essential point is -- as the Commission has noted -- that "a rate structure that uses different ratemaking methods to determine the rates that different users pay for comparable services is inconsistent with the national policy prohibiting unjust or unreasonable rate discrimination . . . ."[20]

GTE and U S West attempt to make much of the fact that Section 254(g)'s rate integration requirement applies to a "provider of interstate interexchange telecommunications services"[21] and therefore, allegedly, individual operating companies cannot be treated collectively because each operating company is a separate "provider."[22] The argument cannot bear the weight GTE and U S West pile on it. To give it credence would suggest that Congress intended to allow any telecommunications enterprise to balkanize its rate structures according to its own organizational desires -- an untenable proposition. It would clearly defeat the statutory regime were, for example, an interexchange carrier's holding company to own a separate operating company for each state and then to argue that each such operating company's

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[20] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Notice of Proposed Rulemaking, 1985 FCC LEXIS 2532 at ¶ 10 (emphasis added). In complaining that rate integration will require GTE affiliates with low-cost services to subsidize the comparable services of high-cost affiliates (such as its Guam-based affiliate), GTE is arguing against the intent of the statute. GTE Petition at 9, n. 15. Again, Congress's goal in codifying rate integration was to ensure that all Americans enjoy the benefits of that policy.

[21] 47 U.S.C. § 254(g) (emphasis added).

[22] GTE Petition at 3-5; U S West Petition at 5-6.

rate integration obligations are different.[23] At best, the statute is silent as to whether affiliates can be considered collectively. In such circumstances, the Commission has discretion, as it has exercised here, to interpret the statute so as to best effectuate congressional intent.[24]

IV. The Commission Has Properly Concluded that the Rate Integration Requirement Applies to All Carriers

IT&E and AMSC argue that, as carriers with certain high-cost regional services, they should not be required to integrate their rates. They should instead be permitted to assess surcharges in high-cost areas to recoup the extra cost of serving those areas.

Although each carrier alleges that its higher costs grow out of the technical configuration of its system, neither carrier offers a scintilla of evidence as to how, or whether, its regional surcharge corresponds to those higher costs. Rate integration does not preclude a carrier from considering point-to-point costs in establishing its rates but, if the carrier does so, its methodology for passing those costs on to subscribers must be applied in a nondiscriminatory fashion to all point-to-point combinations. Both IT&E and AMSC only offer bald assertions that their surcharges are necessary to cover higher costs. Neither provides any evidence to demonstrate that those surcharges are applied in a manner that does not unlawfully discriminate against high-cost areas.

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[23] As AT&T notes, SNET has filed a complaint against certain AT&T promotional discounts that are targeted only at Connecticut residents. AT&T Petition at 4. If the Commission did not require integration across affiliates, AT&T, for one, would have an incentive to avoid SNET's complaint by establishing a Connecticut-only subsidiary.

[24] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984).

In lieu of such showings, these two carriers offer various arguments as to why the Commission should forbear from the rate integration requirement or grant a waiver of it. As a general matter, the Commission should be wary of all such arguments. The State repeatedly has noted that the Commission cannot forbear from rate integration.[25] Section 10(a) of the Communications Act -- which sets forth the forbearance criteria -- forbids forbearance that would result in unjustly or unreasonably discriminatory rates.[26] The Commission has long recognized that rate integration is an essential safeguard against unreasonable rate discrimination.[27] The State also has questioned whether the Commission has authority to "waive" compliance with the statute's rate integration requirement[28] and questions, as a practical matter, whether the Commission should even consider waiver requests. As the Commonwealth of the Northern Mariana Islands has indicated elsewhere, granting waiver relief from the rate integration requirement threatens to initiate a flood of requests based on supposedly "unique" circumstances.[29]

Assuming arguendo that the Commission can waive the rate integration requirement, neither IT&E nor AMSC has yet demonstrated how its circumstances are so unique that a grant of a waiver would not substantially undermine the requirement itself.

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[25] Comments of the State of Hawaii at 3, 13 & 15. Reply Comments of the State of Hawaii at 17-18.

[26] 47 U.S.C. § 10(a)(1).

[27] Order at ¶ 47.

[28] Comments of the State of Hawaii on Request of AMSC for Extension of Compliance Deadline at 4, n. 12 (Oct. 4, 1996).

[29] Comments of the Commonwealth of the Northern Mariana Islands on Request of AMSC for Extension of Compliance Deadline at 2 (Oct. 4, 1996).

IT&E alleges that it will be prejudiced by rate integration because, unlike national carriers, it cannot spread the high cost of its CNMI-to-Guam services across a large subscriber base. Rate integration thus would reduce IT&E's ability to compete against national carriers.[30] IT&E, however, offers no principled distinction between it and other small carriers that serve rural or remote locations. All small carriers that serve rural and remote locations face the disparate costs inherent in serving those areas. Should all small regional carriers, as IT&E implies, be relieved of their rate integration obligations only because they are small? At what point does a carrier become "large enough" to no longer need such relief? How disparate must the carrier's costs along a specific route be to justify relief? The State cannot imagine how the Commission could fashion a rule applicable to IT&E that would not invite numerous small carriers to seek relief from the rate integration requirement. The Commission already has rejected such blanket relief.[31] It should not begin down the slippery slope to that result. Rather, to the extent IT&E argues that the high cost of serving a single remote communications path requires special consideration, the carrier should raise this point in the Commission's universal service proceeding.

For its part, AMSC alleges that it deserves relief because (1) its service is comprised of an indiscernible mix of local, interstate, maritime and international calls; (2) the company is a small, relatively new carrier, offering a new service in an internationally competitive market; and (3) the company has relied upon the Commission's past approval of its

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[30] IT&E Petition at 6-7.

[31] Order at ¶ 40.

satellite design, as well as the Common Carrier Bureau's previous conclusion that its tariffs were not patently unlawful.[32]

Like IT&E, AMSC offers no principled distinction between its services and others' that would justify granting AMSC long-term or permanent relief from the rate integration requirement.[33] Certainly, the indiscernible mix of AMSC's traffic should not justify relief. AMSC is an interexchange carrier. It should not be exempted from the rate integration requirement merely because its technology cannot determine when it is, and is not, delivering an interexchange call. AMSC's second argument is answered by the fact that the Commission already has found that market share is not justification for relief from Section 254(g)'s requirements. AMSC's reliance arguments are not compelling either. The Common Carrier Bureau did not find AMSC's tariffs lawful. The Bureau merely allowed them to go into effect. In all such cases, the carrier ultimately assumes the risk that its tariffs later will be found unlawful.

AMSC's contention that it designed a system so that the cost of serving offshore points is greater than the cost of serving the contiguous 48 states proves far too much. AMSC

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[32] AMSC Petition, passim. Although AMSC frames these arguments as grounds for forbearance, they are at their heart arguments for a waiver. AMSC emphasizes the supposed uniqueness of its service and the equities in favor of the relief it seeks -- arguments typical of waiver requests. AMSC does not address the elements of Section 10's forbearance analysis except to suggest that offshore consumers will not be significantly affected if AMSC is granted relief, because AMSC's market share is so small. AMSC Petition at 8. The Commission, as mentioned, already has rejected arguments that market share is a dispositive factor in conducting forbearance analyses. Order at ¶ 40.

[33] The State has not objected to AMSC's request for up to one year to come into compliance with the rate integration requirement.

elected this overall design for its system. There is no appropriate basis for rewarding a carrier with relief from regulatory obligations because it has singled out some areas for special adverse treatment. AMSC undoubtedly could have designed its system to serve offshore points at lower cost. This particular line of AMSC's argument is of special concern to the State because it suggests that the State should be denied satellite services at integrated rates (if not denied service altogether) solely based on its location -- an ironic proposition since the evolution of satellite technology was a catalyst for the initial implementation of the rate integration doctrine.[34]

In the end, both IT&E's and AMSC's claims highlight the erroneous assumption that small carriers should have flexibility to discriminate against offshore points. In adopting Section 254(g), Congress answered that question and, in its Order, the Commission has properly interpreted Congress's action.

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[34] On a related note, AMSC alleges that Congress did not intend Section 254(g) to cover its "unique" mobile satellite services, but "only . . . various fixed telecommunications services." AMSC Petition at 5. In support of this argument, AMSC cites language in the legislative history of Section 254(g) instructing the Commission "to require geographic rate averaging and rate integration, and to incorporate the policies contained in the Commission's [1976 rate integration order at 61 FCC 2d 380]." H.R. Rep. No. 458, 104th Cong., 2d Sess., at 132 (1996) (emphasis added). AMSC then claims that since this 1976 decision discussed a subset of telecommunications services only those services should be subject to the rate integration requirement of Section 254(g). AMSC could not be further off the mark. The legislative history clearly instructs the Commission to do three things: require rate averaging, require rate integration and incorporate the policies enunciated in 1976. That is, the 1976 decision elaborates on, but does not limit, the Commission's obligations in this proceeding. More importantly, the statute's plain language encompasses all interexchange services. Indeed, AMSC's argument would suggest that offshore points should forever be deprived of the benefits of rate integration for advanced mobile telecommunications services. Congress certainly did not intend this result.

V. Conclusion

For the foregoing reasons, and those discussed earlier in this proceeding, the State of Hawaii urges the Commission to maintain its course in effecting Congress's universal service goals, as enunciated in Section 254(g) of the Communications Act, by rejecting the aforementioned efforts to eviscerate that provision.

Respectfully submitted,

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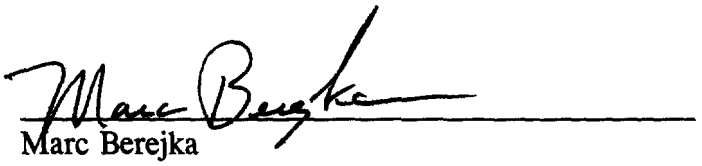
STATE OF HAWAII

October 21, 1996

CERTIFICATE OF SERVICE

I, Marc Berejka, do hereby certify that on this 21st day of October, 1996, I have caused a copy of the foregoing Consolidated Opposition and Reply Comments of the State of Hawaii to be served via first class United States Mail, postage pre-paid, upon the persons listed below.



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